SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000717 05/19/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

AMERICAN REAL ESTATE ADVISORS GEORGE TACKER

v.

KIMBERLY TODD CARLTON C CASLER
JEAN TODD

REMAND DESK-LCA-CCC
TEMPE JUSTICE CT-WEST

MINUTE ENTRY

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial Court, exhibits made of record and the Memoranda submitted.

In a previous case (the "first action"), American Real Estate Advisors, and Walter and Ludmila Kabat (hereinafter "Appellees") filed a forcible detainer action against Kimberly & Jean Todd (hereinafter "Appellants) for non-payment of rent in the Scottsdale Justice Court; the action concerned July and August 2002 rent. On August 29, 2002, the court held that: 1) July 2002 rent had been paid; 2) Appellants made a partial payment for August 2002 rent, and Appellees accepted the partial payment; and 3) Appellants properly followed Arizona's self-help provision – A.R.S. §33-1363(A)[1] – after Appellees failed to repair the Appellants' swimming

[1] "Self-help for minor defects: If the landlord fails to comply with § 33-1324, and the reasonable cost of compliance is less than three hundred dollars, or an amount equal to one-half of the monthly rent, whichever amount is greater, the tenant may recover damages for the breach under § 33-1361, subsection B, or may notify the landlord of the tenant's intention to correct the condition at the landlord's expense. After being notified by the tenant in writing, if the landlord fails to comply within ten days or as promptly thereafter as conditions require in case of emergency, the tenant may cause the work to be done by a licensed contractor and, after submitting to the landlord an itemized statement and a waiver of lien,

pool despite repeated requests. The Scottsdale Justice Court dismissed Appellees' "first action" complaint, but failed to state whether the complaint was dismissed with or without prejudice. A formal judgment of the August 29th dismissal was not signed/entered until January 3, 2003. On August 30, 2002 Appellees served Appellants with another 5-day notice to pay (August 2002 rent) or quit. Appellees filed this forcible detainer action (the "instant action") in the Scottsdale Justice Court on September 20, 2002.

On the day of the trial, Appellees filed a Notice of Change of Judge and the case was transferred to the Tempe West Justice Court, where trial was set for October 25, 2002. At trial, Appellants made a Motion to Dismiss but the motion was denied. At Appellees' request, the trial was continued to November 6, 2002. The court granted Appellants' leave to file a written Motion to Dismiss and directed Appellees to file a written response thereto. Appellants sent a copy of the Motion to Dismiss to the court and to Appellees on October 25, 2002. Appellees never filed a written response to Appellants' Motion to Dismiss. At the November 6, 2002 trial, the court denied Appellants' Motion to Dismiss, and found in favor of Appellees regarding the August 2002 rent, but not as to the October 2002 rent. The judgment for this forcible detainer action was signed/entered on November 15, 2002. On that same day, Appellants filed a Motion to Reconsider and a Motion for a New Trial, but the court denied both motions. Interestingly, five days later, on November 21, 2002, Appellants filed a Request for Final Judgment of the first forcible action (August 29, 2002). Appellant now brings the mater before this court.

The first issue to be addressed is whether *res judicata* precludes retrial of the issue relating to the August 2002 rent. Under the doctrine of *res judicata,* a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action,[2] even when the judgment is entered after the second suit is filed.[3] The doctrine of collateral estoppel (a.k.a. issue preclusion) is applicable when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment.[4]

After a careful review of the record, I find that neither the doctrine of *res judicata* nor the doctrine of collateral estoppel applies in this case. On August 29, 2002, the Scottsdale Justice Court dismissed Appellees' first action against Appellants for non-payment of the August 2002 rent, but failed to state whether the complaint was dismissed with or without prejudice. A formal judgment of the August 29th dismissal was not signed/entered until January 3, 2003. The

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deduct from his rent the actual and reasonable cost of the work, not exceeding the amount specified in this subsection.

[2] *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (1982); *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed 1122 (1955); *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.,* 26 Ariz.App. 204, 206, 547 P.2d 56, 58 (1976).

[3] *Murphy v. Board of Medical Examiners*, 190 Ariz. 441, 949 P.2d 530 (App. 1997).

[4] *Industrial Park Corp.,* 26 Ariz.App. at 209, 547 P.2d at 61; *MooreDrug Co. v. Schaneman,* 10 Ariz.App. 587, 589, 461 P.2d 95, 97 (1969); Restatement (Second) of Judgments § 27.

judgment for the second forcible detainer action was signed/entered on November 15, 2002. It is clear that on November 6, 2002, during the second forcible detainer action (the instant case), the issue of the August 2002 rent had not been fully adjudicated, for a final judgment had not been entered.

However, the issue of abatement arises, and does apply to this case. Both parties concede that proceedings concerning the first action were still going on/yet to receive final judgment when the second trial began; the record shows that that the West Tempe Justice Court was aware of this as well. Consequently, this action abated. An action pending in another court between the same parties, upon the same issue, causes the second action to abate.[5] Hence, as Appellants correctly argue, the trial court erred by failing to grant the Motion for Reconsideration or Motion for New Trial.

The second issue Appellants raise is whether Appellees' Notice of Change of Judge was invalid, thereby rendering West Tempe Justice Court without jurisdiction to hear the second forcible detainer action. This is a non-issue, for Appellants never raised this issue at trial. An appellate court may not review an alleged error at trial where the appealing party fails to make a proper form of an objection, stating specifically the grounds therefore.[6] By their failure to object to this issue at trial, Appellants have waived this issue on appeal

The final issue is whether Appellants' Motion to Dismiss was improperly denied. .Appellant argues persuasively that the complaint in the instant action was not properly verified by someone with personal, first-hand knowledge, as required by Rule 11(B) of the Arizona Rules of Civil Procedure.[7] Here, an unidentified person in the law office of Appellees' former attorney (Mark Heldenbrand) verified the complaint. During the trial, Appellees (Walter Kabat) admitted that he had no contact with Mark Heldenbrand, the attorney that filed the instant action, when the action was filed. He further testified that no one from Mark Heldenbrand's office had any knowledge of the facts. Consequently, the complaint was invalid because it was not properly verified. The trial court erred in failing to dismiss this complaint.

IT IS THEREFORE ORDERED reversing and vacating the judgment of the West Tempe Justice Court in this case.

IT IS FURTHER ORDERED remanding this matter back, with the exception of attorneys fees and costs incurred on appeal, to the West Tempe Justice Court with instructions to grant Appellant's Motion to Dismiss, and for all further, if any, and future proceedings.

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[5] *Allen v. Superior Court of Maricopa County*, 86 Ariz. 205, 344 P.2d 163 (1959); *Sierra v. Perry*, 121 Ariz. 437, 590 P.2d 1383 (1979); *Davies v. Russell*, 84 Ariz. 144, 325 P.2d 402 (1958).

[6] *Montano v. Scottsdale Baptist Hospital, Inc.*, 119 Ariz. 448, 581 P.2d 682 (1978).

[7] "When in a civil action a pleading is required to be verified by the affidavit of the party, or when in a civil action an affidavit is required or permitted to be filed, the pleading may be verified, or the affidavit made, by the party or by a person acquainted with the facts, for and on behalf of such party."

IT IS FURTHER ORDERED that counsel for Appellant shall lodge an order consistent with this minute entry opinion, an application for attorneys fees and costs incurred on appeal, and an appropriate order for costs and fees on or before June 25, 2003.